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SUMMARY RECORD OF THE 23rd MEETING

Chairman: Mr. NEUHAUS (Australia)
(Vice-Chairman)

later: Mrs. FLORES (Uruguay)
(Chairman)

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In the absence of Mrs. Flores (Uruguay), Mr. Neuhaus (Australia), Vice-Chairman, took the Chair.

The meeting was called to order at 10.30 a.m.

AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (continued) (A/48/10, A/48/170-S/25801 and A/48/303)

1. Mr. KOLODKIN (Russian Federation) said that it would be fitting if the twentieth anniversary of the year (1975) in which the International Law Commission had initiated work on the draft articles on State responsibility could be celebrated with a breakthrough in that work.

2. However, serious problems had arisen during the forty-fifth session of the Commission. It had begun consideration of part three of the draft articles before looking at the question of the consequences of crimes, which was supposed to be dealt with in part two. Furthermore, all there was on the consequences of crimes was in the chapter on the subject in the Special Rapporteur's fifth report (A/CN.4/453/Add.2 and 3, chap. II), and a substantial part of that was taken up with the highly controversial issues of the so-called criminal liability of States and the concept of State fault. By their very nature those topics brought the debate back to article 19 of part one of the draft and the very notion of crime, which had already been agreed upon by the Commission. The situation could arise where a request might be made to review once more the concept of crime, and it was by no means clear that that would be justified. Maybe the intention was to postpone discussing issues which might seriously hold up the Commission's work.

3. The Commission had made great progress with respect to the issue of crimes and their consequences. The usual disagreements between the members of the Commission on dispute settlement posed problems, but they were not insurmountable. There were two elements to that controversy. Firstly, the traditional problem of dispute settlement, which related to the interpretation and implementation of the draft articles on responsibility. Secondly, the relatively new issue of disputes involving the use of countermeasures. There were various ways of solving those problems. It might indeed be useful to separate the two elements in question. Part three of the draft could deal with disputes arising from the articles on responsibility and exclude disputes involving countermeasures. His delegation doubted that that part, traditional in the Commission's conventions, should contain complex settlement procedures with many steps, including a compulsory procedure. Responsibility accounted for a large part of international law, which held as a principle that States could voluntarily select means for peacefully settling disputes, primarily those set out in Article 33 of the Charter of the United Nations. For that reason, part three would be more appropriate for the type of settlement mechanisms contained in universal agreements codifying international law. That should not exclude, for instance, the adoption of an optional protocol to the draft articles on State responsibility which would contain more complex and rigorous procedures.

(Mr. Kolodkin, Russian Federation)

4. His delegation considered that the settlement of disputes involving countermeasures was a unique problem and the provisions on it could be put straight into part two. It proposed that the Commission should strengthen in the draft articles the obligation of the State taking countermeasures to propose settlement procedures to the State against which it intended taking those measures. It was not inevitable that the procedures should lead to countermeasures. At the same time, agreement would have to be sought with those members of the Commission who were in favour of discussing compulsory procedures. If the Commission could find a way of strengthening such a procedure it would be taking an important step towards both the codification and the progressive development of international law.

5. With regard to crimes, it was important to retain what was already included in the draft articles and to formulate the link between crimes and their consequences, and the reactions of the organized international community.

6. In conclusion, redrafted provisions on the consequences of crimes should be inserted into the draft articles and should continue to be reviewed by the Commission after work on the draft articles on State responsibility had been concluded.

7. Mr. PUISSOCHET (France) expressed doubts about the wisdom of including the question of dispute settlement procedures in the draft articles on the topic of State responsibility. It was still too early to predict the final form of the draft articles, and a treaty was only one of several possibilities. The question was an important one, particularly when determining whether the dispute settlement provisions applied to all the articles, or only to certain procedures.

8. The dispute settlement provisions proposed by the Special Rapporteur raised firstly a question of principle. France supported the view that such provisions were contrary to the principle of free choice of dispute settlement procedures and were not consistent with Article 33 of the Charter. Indeed, the compatibility of the draft articles with the dispute settlement procedures prescribed in relevant conventions had not been adequately studied, and the establishment of a dispute settlement regime providing for compulsory third-party settlement procedures would not relieve the Commission of the need to remedy the defects of the principal instrument.

9. Generally speaking, the regime proposed in part three of the draft articles was impractical and complicated and its implementation would be too costly for some States. Some of its provisions, moreover, were unacceptable. On the question of finding conciliation, for example, France had long demonstrated its commitment to the principle of peaceful settlement of disputes. Together with Germany, it had recently promoted the elaboration by the Conference on Security and Cooperation in Europe of a draft convention on conciliation and arbitration, from which a number of valuable lessons could be learnt. In order to rally maximum support for the convention, which also established a dispute settlement regime providing for binding conciliation, a number of compromises had had to be made, such as respect for other existing procedures and the optional nature of certain provisions. Nevertheless, for a variety of reasons, some States still

(Mr. Puissochet, France)

found it difficult to ratify the convention. Mutatis mutandis, the same difficulties would be encountered in the case of the draft articles on State responsibility. France, moreover, was reluctant to endow the Conciliation Commission with powers that were too broad. It was proposed that the Commission should be able to order, with binding effect, not only provisional measures of protection but also the cessation of any measures taken by either party against the other. It was unusual to confer such broad powers on a conciliation commission.

10. The third phase of the mechanism, which involved judicial settlement, also posed certain problems. Despite the undoubted progress made in the development of compulsory dispute settlement procedures, it should not be concluded that the time was ripe to introduce the possibility of unilateral recourse to the International Court of Justice. Even when employed as a procedure of last resort, such a provision might cause States to reject the draft convention in its entirety instead of seeking a settlement through non-judicial means. The report of the Special Rapporteur, moreover, merely touched upon such fundamental questions as how to reconcile the proposed mechanism with the principle that the Court's jurisdiction must be based on the free consent of States, and how to reconcile the mechanism with the reservations made by some States in their declaration of acceptance of the compulsory jurisdiction of the Court.

11. While it was important for the Commission to work towards an effective system, it was also important for that system to be broadly acceptable. He therefore regretted that the Special Rapporteur had not considered in greater depth the possibility of recourse to optional dispute settlement clauses.

12. He also had some concerns about the compatibility of the proposals contained in part three with the earlier provisions of the draft articles. He was particularly concerned about the relationship between the proposed dispute settlement system and the provisions of article 12 of part two, which dealt with conditions of resort to countermeasures. Heretofore, the approach taken had reflected the view that countermeasures should be authorized only after the exhaustion of all amicable settlement procedures available, which was in fact the purpose of article 12. He had expressed surprise at the inclusion of such a restriction, since some Commission members included among countermeasures any retaliatory measure and, in a broader sense, any lawful reaction by an injured State. It seemed inappropriate to regulate what was already permitted.

13. Yet, a purely declaratory intent should not be attributed to article 12. He did not share the view expressed in the fifth report of the Special Rapporteur that, in laying down the indispensable "exhaustion" requirement, article 12 (1) (a) only referred to settlement means rather than prescribing such means (A/CN.4/453, para. 61 (c)). That was too broad an interpretation of one of the essential conditions of resort to countermeasures, particularly when account was taken of reprisals not involving armed force. While such an interpretation permitted the Special Rapporteur to justify a highly restrictive system of dispute settlement, certain clarifications were still necessary.

14. The objectives of the dispute settlement procedures proposed in part three of the draft should have been more clearly spelt out. It was unclear, for

(Mr. Puissochet, France)

example, whether the procedures covered the interpretation and application of all articles in a future convention, or only those disputes which might arise from the adoption of countermeasures. The explanation of the Special Rapporteur in support of the first of the two hypotheses was not entirely convincing.

15. Notwithstanding the Special Rapporteur's endeavour to elaborate a structured dispute settlement system as a counterweight to the potential danger of recourse to countermeasures, the ensuing debate had confirmed the French delegation's belief that it was imprudent to venture into such a discussion of countermeasures, since the debate had raised issues that were beyond the scope of the topic of State responsibility. In any event certain problems were bound to follow from establishing too close a link between dispute settlement procedures and countermeasures.

16. Firstly, such an approach would only address a part of the problem. Many members of the Commission were of the view that the provisions governing the peaceful settlement of disputes must also provide for the interpretation of all articles of the future convention. Secondly, by emphasizing disputes arising from recourse to countermeasures, the draft provisions gave the impression that countermeasures were the root cause of the dispute and not the consequence of the original internationally wrongful act. Such a shift of presumptions, from the wrongdoing State to the injured State, was contrary to the general economy of the proposed system. Thirdly, such an approach might produce the opposite effect to that sought, in that a State might adopt countermeasures with the sole aim of forcing another State into third-party conciliation. In order to resolve those difficulties, some members had proposed that the provisions concerning the lawfulness of countermeasures should be dissociated from the more general provisions, which would apply in the standard way to disputes arising from the interpretation of the future convention. That proposal merited further study.

17. Consideration of part three of the draft articles had highlighted a number of unresolved problems. For example, the draft articles concerned State responsibility and it would therefore be an error to use the provisions on the dispute settlement regime to remedy the possible shortcomings of other provisions, particularly those concerning countermeasures. He recognized that the Commission had little room for manoeuvre in its attempt to fashion a system that was more flexible but not lax, stricter but not rigid, and more complex but not too costly. What was clear, however, was that it would be a mistake for the Commission to propose solutions which were acceptable to only a minority of States.

18. Turning to chapter II of the Special Rapporteur's fifth report, which was concerned with article 19 of part one of the draft articles, he wished to make it clear that the notion of attributing responsibility for international crimes to States was unacceptable to France, which had already stated in previous years its objections to the introduction of that concept in article 19. Consideration of notions such as self-defence and the competence of the Security Council went far beyond the Commission's mandate. Even if the Commission's conclusions were to be adopted by some States in a future convention, such a convention could not reduce the powers of the organs of the United Nations, which had been established under the Charter. Moreover, by opening the debate on such

(Mr. Puissochet, France)

questions, the Commission would be disregarding its own decisions, such as its decision not to consider primary rules, which it was in fact doing with article 19.

19. Mr. ITO (Japan) said that the international community had an interest in influencing the difficult work of drafting articles on State responsibility, the slow pace of which gave cause for serious concern. The arguments that had been advanced on the question of dispute settlement procedures during the Commission's most recent session had frequently been based on the individual Commission member's opinion regarding the current character and organization of the international community. Not only would future discussion on the topic be similarly influenced but the type of dispute-settlement procedure for which the Commission opted in that area would serve as a point of reference in other fields. While more time would probably be needed for work on the topic of State responsibility than for other topics, the Commission should find ways to ensure more rapid progress in the drafting of the articles.

20. Turning to specific aspects of the topic, he agreed with the Special Rapporteur on the need to limit the negative aspects of countermeasures. The international community must decide which method to adopt in order to attain that objective. Although the three-step system for dispute settlement proposed by the Special Rapporteur would certainly help to prevent recourse to countermeasures, he doubted whether the international community was mature enough in its structure to be able to adopt such a system. Some argued that, whatever the contemporary character of the international community, the Commission must show the international community the path it should take in that area. However, the Commission's objective was to promote the progressive development and codification of international law and it therefore could not work effectively without taking the realities of the international community into account.

21. Future discussions on the dispute settlement procedure should address the following questions: whether the new dispute settlement system might restrict the right of each State to choose a dispute settlement procedure, as provided for in Article 33 of the Charter; whether the three-step system of dispute settlement could function effectively; and whether it was appropriate to involve the International Court of Justice in the system in the manner proposed. In any event, it was important to define clearly the scope of the proposed dispute settlement procedure and to decide whether the procedure should be applicable only to disputes arising from countermeasures or to all disputes involving State responsibility.

22. Further study was needed on the consequences of the international "crimes" of States, notwithstanding the valuable preparatory work done by the Special Rapporteur. He found convincing the Special Rapporteur's argument that the consequences of the international "crimes" of States should be treated differently from those of other "wrongdoing" by States. Also, the questions of the use of force in response to a "crime" committed by a State, the role of the organs of the United Nations, and other questions, were all very important to the discussion. The Commission should, however, be cautious about widening the

(Mr. Ito, Japan)

scope of the discussion and, in that connection, he hoped that the Special Rapporteur would propose draft articles dealing with that question in his following report.

23. In conclusion, he noted that, as in 1992, the Commission had deferred its decision on certain draft articles because they lacked commentaries. He hoped that such deferral would not establish itself as a practice of the Commission, thus delaying its work further. It was in fact an appropriate time for the Committee to reconsider how the commentary should be treated for all topics addressed by the Commission.

24. Mrs. Flores (Uruguay) took the Chair.

25. Mr. MOMTAZ (Islamic Republic of Iran) said that the various forms of reparation proposed by the Commission concerned breaches of "ordinary" international law, commonly referred to as international delicts, and excluded more serious breaches of erga omnes obligations, known as international "crimes". Having regard to the distinction previously drawn by the Commission between those two categories of wrongful acts, it was quite logical that the respective legal consequences should not be the same. The Commission should therefore carry out an in-depth study of the different aspects of the implementation (mise en oeuvre) of the responsibility of a State which committed an international crime.

26. The distinction drawn in article 6 between the cessation of wrongful conduct and reparation for an internationally wrongful act was fully justified and conformed to a well-established practice.

27. It was clear from a reading of the commentary on article 6 bis that the realities of State practice in respect of reparation had not always been reflected in the draft provisions on the topic.

28. Paragraph (8) of the commentary to article 6 bis rightfully referred to equitable considerations and more particularly to cases in which the financial resources of the author State were limited. The Commission had implicitly recognized that such circumstances could affect a State's obligation to make reparation, which, for reasons of equity, might not be provided in full. At the same time, paragraph 2 of article 6 bis, which dealt with the determination of reparation, did not make explicit reference to such circumstances.

29. Paragraph (12) of the commentary to article 6 bis referred to provisions of conventional law permitting Contracting States to reject the claim for reparation if it conflicted with their constitutional law or limit claims for reparation. That concept, however, was in keeping with neither the letter nor the spirit of paragraph 3 of article 6 bis, which, on the contrary, prohibited the State which had committed the internationally wrongful act from invoking the provisions of its internal law as justification for its failure to provide full reparation. In his view, paragraph 3 would reflect reality more accurately by making a distinction between the constitutional law and other provisions of the internal law of the State which had committed the wrongful act. The significance of constitutional norms in all legal systems justified the

(Mr. Momtaz, Islamic Republic of Iran)

elaboration of a special system under which the criteria used to determine reparation would be adapted to the particular circumstances involved.

30. Restitution in kind, more commonly known as restitutio in integrum, was considered the most typical form of reparation. Yet, it was rarely used because of the practical difficulties involved. Draft article 7 (Restitution in kind) listed the possible obstacles to the re-establishment by the State which had committed an internationally wrongful act of the situation that would have existed if the act had not been committed. The obstacle mentioned in paragraph (9) of the commentary to article 7, namely the treaty obligations of the State that had committed the wrongful act, should be included in the draft article. The entire question of restitution in kind merited further consideration, with due regard being given to States' obligations under the 1969 Vienna Convention on the Law of Treaties.

31. Compensation, dealt with in article 8, was the most commonly used and most adequate form of reparation. Nevertheless, attempts to assess damage frequently gave rise to serious difficulties, in particular with respect to the criteria used to determine the amount of compensation. In that context, the question had been raised as to whether loss of profits should be included in the determination of the amount to be awarded, as, for example, in the case of foreign investors whose capital had been nationalized. Such questions were difficult to resolve, particularly in the absence of any well-established practice. It might, therefore, be preferable to omit the reference to loss of profits in paragraph 2 of article 8, which could instead indicate that compensation should take into consideration any pertinent circumstances. In addition, States should be encouraged to conclude compensation agreements under which they would undertake to pay compensation for any damage by means of an overall fixed amount, to be determined by mutual agreement. The commentary to article 8 should bear that reality in mind and provide supporting examples.

32. Satisfaction was a form of reparation suited to inter-State and non-material damage and, accordingly, his delegation welcomed the provisions of draft article 10 on that matter. In his view, paragraph 3 should encourage even greater respect for the sovereignty of the State which had committed the wrongful act: not only should paragraph 3 prohibit any demands for satisfaction by the injured State that might impair the dignity of the wrongdoing State, but it should also prohibit any demands which constituted interference in the internal affairs of that State.

33. Lastly, he hoped that the Commission would complete its first reading of the draft articles on State responsibility by 1996.

34. Mr. ČIŽEK (Czech Republic) said that the Commission had moved forward in its work on State responsibility, owing in large part to the efforts of the Special Rapporteur on the topic. Turning to part two of the draft articles on State responsibility, he welcomed the inclusion in article 1 of a second paragraph which stated explicitly that the legal consequences arising from an internationally wrongful act were without prejudice to the continued duty of the State that had committed the act to perform the obligation it had breached.

(Mr. Čižek, Czech Republic)

Article 1 thus made explicit a principle established in the doctrine and practice of most States: the new obligations of the wrongdoing State were of a secondary nature and did not replace its primary obligations.

35. Article 6 (Cessation of wrongful conduct) was entirely satisfactory. It might be asked whether the duty to cease wrongful conduct represented an independent obligation or was merely the logical consequence of the duty to perform the primary obligation, which was already set forth in paragraph 2 of article 1. Nevertheless, article 6 seemed wholly justified from a practical point of view.

36. He welcomed the Commission's decision to include article 6 bis on reparation. The term "reparation" was used there in a generic sense, which was in accordance with international legal practice and doctrine, and covered all the forms of secondary obligations, which were then specified in articles 7 to 10 bis. He also appreciated the explicit statement in paragraph 1 of article 6 bis that the various types of reparation could be obtained singly or in combination.

37. Paragraph 2 of article 6 bis introduced an important new element, namely that in the determination of reparation, account should be taken of the negligence or the wilful act or omission of the injured State or a national of that State on whose behalf the claim was brought, which had contributed to the damage. In his view, the decision to state that principle under article 6 bis, thereby extending its application to all forms of reparation, was justified. Similarly, paragraph 3, which prevented the State which had committed the internationally wrongful act from invoking the provisions of its internal law as justification for the failure to provide full reparation, belonged in a general article on reparations; it followed logically from article 4 of part one, according to which the provisions of internal law had no bearing on the characterization of the State's conduct as an internationally wrongful act.

38. A proposal to transfer some of the provisions of article 7 (Restitution in kind) to article 6 bis had been considered by the Commission, where the prevailing opinion had been that subparagraphs (a) to (d) of article 7 were only appropriate in the context of restitution in kind. It could, of course, be argued from a theoretical point of view that subparagraph (b), which prohibited the breach of an obligation arising from a peremptory norm of general international law, was generic in nature and thus was not applicable solely in the context of restitution. However, in practice it was difficult to imagine any form of reparation other than restitution which might give rise to that sort of breach.

39. The right of the injured State to compensation, as set forth in article 8, appeared to be a subsidiary question since that right existed only when the damage was not made good by restitution in kind.

40. The Commission had so far not dealt with the question of whether and to what extent the injured State had the right to choose the form of reparation it wished to obtain, in particular with regard to restitution in kind and

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compensation, which might give rise to practical problems. His delegation hoped that the Commission would consider that question before finalizing its work on part two of the draft articles on State responsibility.

41. Article 10 dealt with satisfaction, the primary purpose of which was the reparation of moral damage, and gave rise to some delicate issues. While the provisions of article 10 were on the whole well balanced, it might be asked whether there was a need to distinguish between nominal damages and damages reflecting the gravity of the infringement, since the only example cited for the latter situation was the Rainbow Warrior case. Subparagraph (d), which was concerned with disciplinary action against, or punishment of, those responsible for an internationally wrongful act, was based firmly in the literature and represented a logical link between the field of international responsibility of States and the field of criminal responsibility of individuals.

42. Since the articles on countermeasures elaborated by the Drafting Committee had not yet been considered by the Commission, he would limit himself to expressing the hope that at its next session the Commission would be able to deal successfully with all the problems associated with that complex issue. Countermeasures represented one of the main issues involved in the codification of State responsibility, and efforts should be made to elaborate articles which would meet with the widest possible acceptance.

43. The dispute settlement procedure proposed by the Special Rapporteur in his fifth report on the topic of State responsibility was designed to be more effective than the system proposed by the previous Special Rapporteur and accordingly leaned more heavily on the application of third-party settlement procedures. Its principal aim had been to eliminate certain negative effects arising from the application of unilateral countermeasures. In that connection, the Commission needed to clarify the relationship between draft articles 1 to 6 and the annex, as proposed by the Special Rapporteur in his fifth report, and the draft articles on State responsibility as a whole. Part three of the draft articles, which dealt with dispute settlement procedures, should not be limited to potential disputes, such as those concerning the adoption of countermeasures. Rather, it should include standard provisions relating to the settlement of international disputes arising from the interpretation and application of the provisions of the future convention. That would not exclude the possibility of introducing specific provisions applicable under certain circumstances, in which case States should also be entitled to decide to what extent they wished to be subject to the obligation to resort to a third-party settlement procedure.

44. The three-tier dispute settlement system proposed by the Special Rapporteur was very ambitious and rather impractical. Nevertheless, the idea of using third-party settlement procedures in the context of countermeasures was fully justified and merited further consideration.

45. Chapter II of the Special Rapporteur's fifth report dealt with the consequences of the so-called international "crimes" of States, as defined under article 19 of part one of the draft articles. The Special Rapporteur had raised a number of questions in that connection, and the Czech delegation was confident that the Commission would deal satisfactorily with them during its current mandate.

46. Mr. RAO (India) said that much of the Commission's work at its last session had been carried out by small working groups or within the Drafting Committee; those groups had managed in a short period of time to produce an enormous amount of high-quality work.

47. The Commission had for the first time made real progress on the topic of international liability. The ninth report of the Special Rapporteur on that topic had been devoted entirely to the issues relating to prevention in respect of activities entailing a risk of causing transboundary harm. That narrow focus had caused some concern among Commission members, who feared that the Commission might fail to deal with other more important questions relating to remedial measures, including compensation in the case of damage.

48. During the Commission's discussion, the question of the relationship between the topic of international liability and that of State responsibility had been raised. Some Commission members believed that the two topics were far from distinct, reasoning that if States were under the obligation to regulate activities from the perspective of prevention only, failure to comply would give rise to issues related to State responsibility. Others considered the two topics as distinct, and his delegation favoured the latter view. In fact, the topic of international liability included not only the role of the State in regulating activities likely to cause transboundary harm but also the need to make the operators involved in such activities accountable for any damage that might occur.

49. The Commission was finally bringing coherence and clarity to its consideration of the topic of international liability. However, it had not yet freed itself sufficiently from the original emphasis on State liability, as opposed to liability in general. A State might not be able to control the activities of private operators for a number of reasons, including the human rights and freedoms of the juridical and natural persons involved and the need to keep the State separate from the other entities engaged in production and services. Under such circumstances, a State was not in a position to impose excessive restrictions on the activities of private entities.

50. States naturally played an important role in the area of prevention of transboundary harm; they were responsible for prescribing standards, enacting the necessary laws and regulations and monitoring implementation of community goals embodied by such laws and regulations. At the same time, the operator had the primary and more elaborate role; his responsibilities might include submission of technical data for the project, determination of the risk level involved, supplying information on proposed measures to deal with risk, or providing insurance coverage to meet possible claims for compensation. In cases where an activity that either was proposed or was already being conducted was identified as entailing a risk of causing substantial or significant transboundary harm, the State concerned might refuse to grant permission for the activity to be conducted or might require the discontinuance of the activity if it was not satisfied that there were enough safeguards to prevent damage or if adequate insurance to meet possible claims for compensation was lacking.

51. While a careful distinction must be made between the role of the State and the operators, with liability being attributed primarily to the latter, that did

(Mr. Rao, India)

not in any way change the fact that innocent victims must be adequately and expeditiously compensated for any injury suffered as a result of transboundary activity. The Commission should explore all possible means of developing a suitable liability regime for innocent victims, which might include details on States' responsibility for protecting the environment. The Commission should also consider the possibility of developing, as had been done in the field of nuclear energy, alternative sources of funding which could be used when provisions made by the operators were not adequate to meet reasonable demands for compensation.

52. Turning to the draft articles on international liability, he said that articles 12, 13, 14 and 16 needed to emphasize the fact that primary responsibility fell to the operator and residual responsibility to the State. At best, article 11 (Prior authorization) stated an obvious point; at worst, it created several difficulties in terms of implementation. It was often difficult for a State to determine that a particular activity had an inherent risk of causing transboundary harm. Furthermore, in most States, the industry and its operators were required by law to seek prior authorization. The State's duty should be to enact appropriate legislation; it should not be held responsible for every activity conducted on its territory, whether or not it had granted prior authorization. His delegation recognized that the trend in international agreements was to require States to adopt legislation on basic issues in order to ensure that specific obligations were carried out. Enacting such laws and monitoring the various activities being carried out in the State required financial and other resources that might not be available to all States. Thus, appropriate assistance, including financial aid, should be accorded to the developing countries to enable them to discharge their obligations in that regard.

53. Article 13 (Pre-existing activities) demonstrated how an excessive emphasis on State liability could give rise to distorted priorities. According to that article, even when a State had ascertained that an activity involving risk was being carried out without authorization under its jurisdiction or control, there was no restriction on an operator who had failed to seek prior authorization for that activity, even when he was required to do so. Moreover, that activity could continue, on the understanding that the State would be liable for any transboundary harm caused. The article should in fact set forth the reverse proposition: the operator should be required to cease the activity involving risk and seek the necessary authorization. In the meantime, if damage did occur, the operator, and not the State, should be liable.

54. In respect of article 15 (Notification and information), there was no need for the State of origin to notify in every case the other State or States likely to be affected by a proposed activity which would be carried out on its territory and which might involve a risk of transboundary harm. Operators, and foreign operators in particular, might be required under certain circumstances to notify those States. Furthermore, the obligation to notify other States should be limited to those cases where the potential risk involved substantial or significant harm. The possibility of providing information to other States

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on request might also be considered. Article 15 and others of its kind gave the impression that the issue of international liability was being overregulated.

55. Article 17 (National security and industrial secrets) was a necessary provision but needed careful drafting in order to balance the interests of the State of origin and the other States likely to be affected.

56. Article 18 (Prior consultation) and article 19 (Rights of the State presumed to be affected), as they stood, might give rise to difficulties in circumstances where States disagreed as to the level of risk of transboundary harm. While the articles did not give States the right to veto plans of other States, the mere obligation to consult inevitably entailed a limitation on the freedom of choice enjoyed by every State in the exercise of its permanent sovereignty over its natural resources. As the Special Rapporteur had pointed out, one solution was to rely on the general obligation of States to settle their disputes peacefully as provided for under the Charter of the United Nations. Another possible solution was to request the opinion of a neutral expert. However, the value of those proposals had not been demonstrated. In his view, it would be best to omit that matter from the draft articles. Article 20 bis and the "polluter pays" principle likewise required careful scrutiny to determine whether they belonged in the proposed set of articles.

57. Prevention could not be dealt with in the abstract, and different categories of principles of prevention might be relevant for different types of activities. Furthermore, the needs, interests and circumstances of the developing countries must be given due consideration in elaborating any regime on the topic of international liability. The question of international liability was closely linked to development, mobilization of resources, technology transfer and the very status of countries as developing or developed. In that context, his delegation wished to stress that care should be taken to ensure that any regime concerned with international liability did not create new restrictions on the transfer of resources and technologies to the developing countries.

58. Turning to the topic of State responsibility, he said that there were two aspects of the question of dispute settlement that merited consideration and which should in fact be looked at separately. The first related to the legality of the resort to countermeasures, and the second to the peaceful settlement of disputes as a whole.

59. His delegation wished to stress that it had a general reservation concerning codifying the law relating to countermeasures since it would be preferable to establish a framework that limited and conditioned its use or abuse. That was because countermeasures were unilateral and could not therefore be sanctioned a priori by the international community. They tended to be available only to powerful States so if they were justified it would often amount to justifying might over right, and they could not be legitimately used in the promotion of self-interest or special interest by a State which claimed at the same time to be acting on behalf of the international community in defence of the rule of international law. As there was no centralized, commonly

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accepted institution to pronounce upon violations of international law, no State could impose upon other States its view that the action in question was such a violation. If countermeasures were ever to be considered as proper and lawful they must be made subject to legal checks and balances.

60. Consequently, his delegation believed that a State should be obliged to offer credible means of peaceful settlement of disputes to the alleged wrongdoing State before embarking upon countermeasures. That State could accept the offer made or make a counter-offer as long as it was equally credible and sincere. Dispute settlement could be effected through negotiation, conciliation, mediation, arbitration or resort to the International Court of Justice, with the States choosing the means most appropriate to the circumstances.

61. His delegation did not share the view of the Special Rapporteur as to the merits of compulsory third-party settlement of disputes. No single means of settlement of disputes could be inherently better than others if there was no willing acceptance of such a method by all the parties involved. Some of the disputes which were likely to involve countermeasures might not be amenable to ready resolution by arbitration or other forms of third-party legal settlement of disputes. Moreover, when concessions had to be made by the parties involved they were often made in a bilateral and a face-to-face context. Imposed solutions were inevitably flawed, particularly if there was no appreciation of the interests and considerations of all the parties involved. Conflict resolution was more likely to be durable if it was voluntary.

62. It was the view of most Commission members that a State should be required first to make an offer of peaceful dispute settlement as a precondition before it could consider resorting to countermeasures. In that connection, his delegation believed that testing the legality of countermeasures through a binding third-party dispute settlement procedure would not mean much if the system allowed the initiation of countermeasures without preconditions. The Special Rapporteur himself said that unilateral countermeasures were more likely to be abused than not and such abuse was better checked before the damage was done.

63. On the question of whether a future convention on the subject should be accompanied by a dispute settlement regime providing for compulsory third-party settlement procedures, it had been argued that the current political environment provided the best climate for such steps. However, the history of States' adherence to compulsory third-party settlements did not give grounds for any optimism on the part of the Commission, in spite of the increased use of the International Court of Justice and the willingness of States to submit more and more disputes to third parties. Several States had made reservations before they accepted compulsory jurisdiction.

64. It had also been argued that the Commission was duty-bound to develop international law and that that would be entirely dependent on the promotion of compulsory third-party dispute settlement. Progress in that direction had not been made for lack of trying, and the Commission was well advised to proceed with caution and deliberation in such a complicated area, at the risk of finding

(Mr. Rao, India)

the entire set of draft articles on State responsibility rejected. States were not likely to welcome a single regime of compulsory dispute settlement for all types of problems irrespective of their nature, their significance for the countries concerned and the long-term repercussions.

65. The three-step dispute settlement procedure proposed by the Special Rapporteur appeared to be too rigid, somewhat cumbersome and costly. It contradicted the concept of freedom of choice of means to settle disputes as provided by Article 33 of the Charter. The procedures involved would be too time-consuming, and it also meant that the three-step system would override any other system agreed to by parties under existing bilateral and multilateral treaties. That would be quite unacceptable. Even those in favour of the compulsory third-party dispute settlement procedure could not agree on the exact form it should take and did not necessarily endorse the system proposed by the Special Rapporteur.

66. In view of the above, his delegation recommended that the Commission should work only on parts one and two and should not opt for a rigid and cumbersome compulsory dispute settlement procedure.

67. Mr. AL-BAHARNA (Bahrain) said that his delegation welcomed the Commission's decision to complete by 1996 the first reading of the draft articles on State responsibility.

68. The Special Rapporteur had proposed a three-step dispute settlement regime which would help eliminate or minimize countermeasures. As expected, the discussions in the Commission had proved inconclusive. Several objections to compulsory dispute settlement procedures had been raised, including by his delegation, whose principal objection centred on the likely implications of such procedures for international law. Any dispute settlement provision in respect of State responsibility would affect both primary and secondary obligations regardless of the subject-matter, so that, for instance, the legality of armed attack, assistance to insurgents and counterinsurgents and the suspension of treaties would come within the purview of the dispute settlement regime. If it was to be compulsory then such questions would be open to settlement by compulsory third-party means, and it was unlikely that States would willingly do so. The Commission should adopt a more moderate approach to dispute settlement regimes.

69. His delegation considered that the approach adopted by the Special Rapporteur went against the letter and spirit of Article 33 of the Charter, which provided a multiplicity of means of settlement of disputes along with freedom of choice. Furthermore, since 1958, the codification conventions mostly provided for jurisdiction of the International Court of Justice in the form of optional protocols to the substantive conventions. His delegation saw no good reason to change such tried and tested practices. Any dispute settlement regime should be relatively simple and flexible. His delegation wished to suggest that all disputes arising out of the future convention on State responsibility, and not merely disputes relating to countermeasures, should be settled amicably by negotiation, failing which both parties might agree to have recourse to arbitration or adjudication by the International Court of Justice, whose

(Mr. Al-Baharna, Bahrain)

jurisdiction would be mainly consensual except in respect of breaches of principles of jus cogens, a regime which would be less cumbersome and more cost-effective than the hierarchical three-step settlement regime proposed by the Special Rapporteur.

70. Mr. PASTOR RIDRUEJO (Spain) said that his delegation was in favour of including a dispute settlement regime in the draft articles on State responsibility. The Commission should not work on the assumption that Governments would be reluctant to commit themselves to dispute settlement procedures. It should not be timid about fulfilling its responsibility not only to codify international law but also to promote the progressive development of international law, and thus, its duty to confront Governments with the social need to set up dispute settlement mechanisms in connection with the extremely important issue of State responsibility. Moreover, a comprehensive and effective dispute settlement regime would serve to protect weaker States from potential abuse on the part of stronger States, thus contributing to the effective application of the fundamental principle of the sovereign equality of States, as well as enhancing respect for international law and, in the final analysis, promoting the maintenance of peace.

71. With regard to the scope of the draft articles, he said that the system should be as comprehensive as possible, covering not only the question of the lawfulness of countermeasures but also all de facto or de jure issues that might arise with respect to a specific act that would give rise to the international responsibility of a State, including the problem of determining whether or not there had been a breach of a primary rule.

72. The particular dispute settlement system that had been proposed by the Special Rapporteur in his fifth report offered a suitable starting-point for a useful discussion, although it would be necessary to clarify the underlying question of whether the system would only be triggered by a dispute regarding the lawfulness of a countermeasure. It should be clearly established that the mechanism would apply in the broadest sense, even in the absence of countermeasures. Moreover, the mechanism should apply independently of the role played in the mechanism by compulsory jurisdiction. His delegation did not agree with the approach taken in the Special Rapporteur's fifth report regarding the possibility (in article 6) of submitting to the International Court of Justice any decision of the Arbitral Tribunal tainted with excès de pouvoir or departing from fundamental principles of arbitral procedure. His delegation did not agree with that provision because the losing party would undoubtedly always find some reason to appeal to the International Court of Justice, and the practice could become institutionalized, to the detriment of the authority and effectiveness of arbitral tribunals.

73. Turning to the question of the consequences of the international "crimes" of States, as defined in article 19 of part one of the draft articles, he said that, in the view of his delegation, the International Law Commission should derive pejorative consequences, in part two of the draft articles, from the definition of international crimes included in part one, because in principle, the effects of perpetrating such a crime should not be limited to an obligation

(Mr. Pastor Ridruejo, Spain)

to make reparation, but rather they should also include punishment of the responsible State.

74. With regard to the matter of instrumental consequences, or countermeasures, he said that his delegation attached great importance to the question of determining the extent to which it was admissible to resort to force in response to an international crime. The use of force by the injured State or States should be admissible only in so far as it fell within the confines of Article 51 of the Charter, in other words, when the international crime constituted an act of aggression. Beyond that, de lege lata, his delegation did not consider it admissible to take any further coercive measures other than the institutional measures envisaged in Chapter VII of the Charter. Moreover, de lege lata, the Security Council could apply sanctions that would include the use of force against the perpetrator of an international crime (as defined in article 19 of part one) other than an act of aggression, by interpreting the concept of "threat to the peace" envisaged in Article 39 of the Charter in a non-formal sense. Even though the Security Council had recently applied such an interpretation - for example, in the cases of former Yugoslavia and of Somalia - that still was not the best solution, inasmuch as it entailed the risk of opening the door to a broad interpretation that could lead to abuse. Moreover, it was extremely difficult, both politically and juridically, to determine the legality of the Security Council's actions. Consideration might be given, de lege ferenda, to the possibility of authorizing the Security Council to adopt sanctions, including the use of force, should it determine that an international crime under the terms of article 19 of part one of the draft articles had been committed. That would certainly be the ideal solution, but it would entail amending the Charter in areas which were extremely sensitive from the political standpoint.

75. Mr. VIO GROSSI (Chile) said that the considerable progress that had been made by the International Law Commission in its study of the draft statute for an international criminal tribunal and the recent events in former Yugoslavia had strengthened his Government's position in support of the idea of setting up such a tribunal. His country's basic position on the issue could be summarized in the following points: the establishment of the international criminal tribunal should be dealt with independently from the drafting of the Code of Crimes against the Peace and Security of Mankind; the establishment of an international criminal tribunal should not exempt States from the obligation to bring to trial or to extradite persons accused of crimes against the peace and security of mankind; the competence of the tribunal should be subsidiary to that of national tribunals, with international criminal jurisdiction applying only in the absence of national jurisdiction; the international court should be created by means of a treaty within the framework of the United Nations; the international criminal tribunal should be a permanent mechanism whose judges would meet without delay and only when convened; the competence of the tribunal should be compulsory in respect of serious and fundamental crimes in which mankind as a whole was considered the victim, as in the case of genocide, whereas in all other cases its competence should be optional; the international tribunal should also have competence to advise national tribunals on the interpretation of treaties relating to international crimes; the tribunal should

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deal with offences that were specifically characterized in treaties; and the tribunal should only consider offences committed by individuals, and it should not be competent to judge States.

76. His delegation noted with satisfaction that most of those views were reflected in the text which was now before the Sixth Committee. With regard to the draft statute included in the report of the International Law Commission (A/48/10, annex), he said that since it was not feasible for the tribunal to be established as a subsidiary body of the United Nations, the treaty by which it was set up should be adopted by the United Nations General Assembly. The treaty in question should establish the obligations and powers of the United Nations organs that would be involved in facilitating the work of the tribunal, and agreements should be drawn up to regulate the relationship between the tribunal and the United Nations and the obligations of the latter.

77. By the same token, in order to ensure universal acceptance of the international criminal tribunal, its competence should be restricted, so that it would only deal with international crimes that were characterized as such by treaties, with other crimes being left to the domestic jurisdiction of States, except in cases where the State or States concerned agreed to accept its jurisdiction. His delegation was in favour of a formula whereby the statute would provide that States parties recognized the tribunal's power to consider and try a case, with such exceptions as each State might sovereignly wish to establish within the framework of the statute.

78. His delegation considered that the Security Council should have the right to refer cases to the international criminal tribunal, in order to ensure a satisfactory relationship of mutual respect between the two bodies.

79. Turning to the question of the right to challenge the competence of the international criminal tribunal, he said that a distinction must be made between a situation involving an international crime that was characterized by a treaty and all other situations. In the first case, any State party would have the right to challenge the competence of the tribunal; in other cases, only States having a direct interest in the matter would have that right. The accused should also have the right to challenge the competence of the tribunal. In any event, a chamber of the tribunal would be responsible for settling the matter. The International Law Commission should study in greater detail the issues raised in those situations in which the tribunal would have exclusive competence. It was not enough to stipulate that the international criminal tribunal would have competence in those cases where the States concerned agreed to grant it such competence. Such a procedure would be tantamount to delegating powers to a supranational body, and that, in turn, could give rise to serious constitutional problems in a number of States. The question had to do with the very raison d'être of the international criminal tribunal, which was twofold: the tribunal was necessary not only because international crime affected the international community as a whole, but also because national tribunals were not able to deal with such crimes effectively and promptly.

80. More careful consideration must also be given to the question of deciding when a national court had not fulfilled its duty to deal with international

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crimes, thus giving rise to the need for the international criminal tribunal to act. It was particularly important to establish who should assess the performance of the national courts, determine the rights of the State concerned, evaluate the application of the rule of prior exhaustion of internal recourse and, consequently, decide on the eventual transformation of the case into a dispute between the State of the national courts and the international criminal tribunal. It was also important to determine how all that should be done.

81. The study to be carried out by the International Law Commission should not be based solely on the premise that the competence of the international criminal tribunal would be restricted to those cases when States agreed to have it consider and try international crimes characterized by treaties. An analysis should also be made of those exceptional situations in which the international criminal tribunal would be competent even when the State or States concerned were not parties to the statute. In other words, the discussion should be extended to considering situations such as those experienced recently in former Yugoslavia, with a view to providing the international community with a permanent mechanism for avoiding impunity in extreme situations and in cases where States refused to observe the most basic legal order.

82. Consideration should also be given to problems that might arise in the event that the States of a given region established a regional criminal tribunal similar to the universal one. Such situations might give rise to conflicts relating to hierarchy and international competence.

83. Lastly, his delegation believed that, just as the draft statute provided for the Security Council to determine when aggression had occurred and when individuals should be tried, consideration should be given to the effect of decisions of international human rights courts with respect to individual responsibility in cases that might be considered and tried by the international criminal tribunal.

84. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that, while his delegation understood that it might be premature to comment on the matter at the present time, it did wish to express its satisfaction at the manner in which the International Law Commission had dealt with such a complex matter. Without prejudice to any comments his delegation might wish to make in due course on the draft articles, he stressed that the Government of Chile attached great importance to the issue, especially those aspects having to do with transboundary harm and the environment. In particular, the Chilean population had been made aware of the potential risk of transporting, through waters close to Chilean territory, extremely dangerous materials, such as plutonium. Hence the urgency of establishing universal regulations regarding liability for acts not prohibited by international law.

85. Turning to the topic of State responsibility, he said that his delegation was mainly concerned with the question of so-called instrumental consequences, i.e., countermeasures. In an essentially decentralized society such as the present international community, the role of countermeasures could not be ignored or denied. Countermeasures constituted an individual response to a

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wrongful act in the absence of collective, timely and organized action. Although countermeasures were essentially a juridical instrument, they should be regulated by law, in order to prevent them from becoming a purely political instrument to be used only by those States which were in a position to implement such measures in order to obtain justice. The matter was particularly important when force was used as a countermeasure. One of the most important achievements of the contemporary international community had been its ability to bring force under the rule of law. The basic structure in which the use of force was defined by international law - as an internationally wrongful act, an act of self-defence or a sanction under Chapter VII of the Charter - should not be altered in any way that might give rise to inequality and arbitrary action. The use of force should not be unilaterally qualified by a State or a group of States, even if they were acting in good faith. If the International Law Commission's approach of making a distinction between delicts and crimes was to be implemented, that must be done by an institutional system, i.e., the United Nations and its various organs, including the International Court of Justice. Such serious matters must be dealt with by the international community as a whole, in order to put an end to their effects and to prevent them from being repeated.

The meeting rose at 12.40 p.m.